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DEPARTMENT OF TRANSPORTATION

Pipeline and Hazardous Materials Safety Administration

49 CFR Parts 105, 107, and 171

[Docket No. PHMSA-2012-0260 (HM-233E)]

RIN 2137-AE99

Hazardous Materials: Special Permit and Approvals Standard Operating Procedures and Evaluation Process

AGENCY: Pipeline and Hazardous Materials Safety Administration (PHMSA), DOT.

ACTION: Notice of proposed rulemaking (NPRM).

SUMMARY: PHMSA is proposing to address certain matters identified in the Hazardous Materials Transportation Safety Act of 2012 related to the Office of Hazardous Materials Safety's Approvals and Permits Division. Specifically, we propose to revise the regulations to include the standard operating procedures and criteria used to evaluate applications for special permits and approvals. These proposed amendments do not change previously established special permit and approval policies. This rulemaking also proposes to provide clarity regarding what conditions need to be satisfied to promote completeness of the applications submitted. An application that contains the required information reduces processing delays that result from rejection, and further facilitates the transportation of hazardous materials in commerce while maintaining an appropriate level of safety.

DATES: Comments must be received by [INSERT 60 DAYS FROM PUBLICATION IN THE FEDERAL REGISTER]. To the extent possible, PHMSA will consider late-filed comments as a final rule is developed.

ADDRESSES: You may submit comments by identification of the docket number (PHMSA-2012-0260 (HM-233E)) by any of the following methods:

- Federal eRulemaking Portal: Go to <http://www.regulations.gov>. Follow the online instructions for submitting comments.
- Fax: 1-202-493-2251.
- Mail: Docket Operations, U.S. Department of Transportation, West Building, Ground Floor, Room W12–140, Routing Symbol M–30, 1200 New Jersey Avenue, S.E., Washington, DC 20590.
- Hand Delivery: To Docket Operations, Room W12–140 on the ground floor of the West Building, 1200 New Jersey Avenue, S.E., Washington, DC 20590, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays.

Instructions: All submissions must include the agency name and docket number for this notice at the beginning of the comment. All comments received will be posted without change to the Federal Docket Management System (FDMS), including any personal information.

Docket: For access to the dockets to read background documents or comments received, go to <http://www.regulations.gov> or DOT’s Docket Operations Office (see ADDRESSES).

FOR FURTHER INFORMATION CONTACT: Donald Burger, Office of Hazardous Materials Safety, Approvals and Permits Division, (202) 366-4535 or Eileen Edmonson, Office of Hazardous Materials Safety, Standards and Rulemaking Division, (202) 366-8553, Pipeline

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I. Executive Summary

On July 6, 2012, the President signed the Moving Ahead for Progress in the 21st Century Act (MAP-21), which includes the Hazardous Materials Transportation Safety Improvement Act of 2012 (HMTSIA) as Title III of the statute. See Public Law 112-141, 126 Stat. 405, July 6, 2012. Under § 33012 of HMTSIA, Congress directed the U.S. Department of Transportation (Department or DOT) to issue a rulemaking to provide:

- Standard operating procedures (SOPs) to support the administration of the special permit and approval programs; and
- Objective criteria to support the evaluation of special permit and approval applications.

In this NPRM, we are proposing to provide the public with notice and an opportunity to comment on the procedures PHMSA currently uses to support the administration of its special permits and approvals programs with the intent of eventually adding these procedures to a new Appendix A to Part 107, Subpart B of the 49 CFR. Incorporation of SOPs and objective criteria to support the evaluation of special permits and approvals accomplishes the mandate under § 33012 of MAP-21.

The benefits of this NPRM include: increasing the public's understanding of the special permit and approval application and renewal process, improving the quality of information and

completeness of applications submitted, and improving application processing times. This NPRM does not impose any additional costs on industry. This proposed rule would affect only agency procedures; therefore, we assume no change in current costs or benefits.

II. Background

A. MAP-21

To assist PHMSA with managing its special permit and approval programs, Federal hazardous materials (hazmat) transportation law (law) requires PHMSA to “... issue regulations that establish—(1) standard operating procedures to support administration of the special permit and approval programs; and (2) objective criteria to support the evaluation of special permit and approval applications.” See 49 U.S.C. § 33012(a)(1) and (a)(2). PHMSA established a work group in July 2012 to examine ways to streamline the fitness review process while maintaining an acceptable level of safety, and to define and determine the adequacy of criteria that should be used to initiate fitness reviews. As a result of this workgroup’s efforts, PHMSA is proposing in this NPRM to add updated SOP and evaluation criteria we currently use to process special permit and approval applications into the Hazardous Materials Regulations (HMR; 49 CFR Parts 171-180).

The HMR prescribe regulations for the transportation of hazardous materials in commerce. PHMSA issues variances from the HMR in the form of a “special permit.” It also provides written consent to perform a function that requires prior consent under the HMR in the form of an “approval.” These variances are designed to accommodate innovation, provide consent, and allow alternatives that meet existing transportation safety standards and/or ensure hazardous materials transportation safety. Federal hazmat law directs the Department to determine if the actions specified in each application for a special permit establish a level of

safety that meets or exceeds that already present in the HMR, or if not present in the HMR establish a level of safety that is consistent with the public's interest. PHMSA, through the HMR, applies these same conditions to the issuance of an approval. Due to the unique features that may exist in each application, PHMSA issues special permits and approvals on a case-by-case basis.

The HMR currently define a special permit as “a document issued by the Associate Administrator [for Hazardous Materials Safety, herein described as ‘Associate Administrator’], or other designated Department official, under the authority of 49 U.S.C. § 5117 permitting a person to perform a function that is not otherwise permitted under” the regulations “or other regulations issued under 49 U.S.C. § 5101 et seq. (e.g., Federal Motor Carrier Safety routing requirements).” (See 49 CFR §§ 105.5, 107.1, and 171.8.) An approval is currently defined in the HMR as “written consent from the Associate Administrator or other designated Department official, to perform a function that requires prior consent under” the HMR. (See § 171.8.) Applicants who apply for a special permit must do so in conformance with the requirements prescribed in §§ 107.101 to 107.127. Applicants who apply for an approval must do so in conformance with the requirements prescribed in §§ 107.401 to 107.404, and §§ 107.701 to 107.717. In the following section, we describe the history of PHMSA's SOPs for its special permit and approval programs and the evaluation criteria we currently use to process special permit and approval applications.

B. Standard Operating Procedures

In the mid-2000's, PHMSA, in conjunction with the DOT's Office of the Secretary, conducted an internal agency review of its special permit and approval program practices. This review indicated that some active special permit holders that were no longer in business had used

their special permit in locations not designated in the application, changed company names and locations without informing the agency, or otherwise used their special permit in ways not authorized in the special permit. The Department determined that PHMSA's current practices for assessing the fitness of its special permit and approval holders needed improvement. During the mid and late 2000's, PHMSA experienced an increase in special permit and approval applications while it simultaneously revised its computer software for processing these applications.

In 2009, PHMSA revised its procedures for processing and evaluating special permits and converted them into SOPs for its Special Permits Program. In 2011, PHMSA revised its SOPs for its Approvals Program. As a result of ongoing program evaluation, PHMSA has periodically updated these SOPs to include recommendations, refine its processes, increase uniformity, and respond to upgrades to its data management systems. Further, we discontinued the practice of allowing party status (also referred to as "party-to" status) to an applicable special permit to large associations, instead requiring each holder to apply separately for party status. Party status is granted to a person who intends to offer for transportation or transport a hazardous material, or perform an activity subject to the HMR, in the same manner as the original applicant. We have also issued several rulemakings to incorporate into the HMR special permits that are generally applicable and have a safe performance history. Although PHMSA has incorporated more special permits into the HMR in recent years, requiring individual persons to apply for party status on existing special permits has increased the number of special permit applications received and, thus, the time needed to process them. PHMSA receives approximately 3,000 special permit applications and approximately 20,000 approval applications annually.

To avoid additional processing delays for the special permit and approvals programs, PHMSA has revised its SOPs to change how it manages incomplete applications from the practice of “retaining them while requesting and waiting for missing information” to “rejecting incomplete applications.” Applicants who would like to have their applications reconsidered must resubmit the entire application along with the requested missing information. PHMSA informs applicants in writing of the reason for the rejection and what information is missing from their applications. In the past, some individuals in receipt of rejected applications communicated to PHMSA that the materials they received did not explain how or exactly what was to be resubmitted, which led to more incomplete submissions and processing delays. PHMSA seeks comments on ways to improve the effectiveness of its communications and the completeness of applications it receives.

If, according to the HMR, a special permit or approval application is complete but PHMSA requires an on-site review or additional information to make an appropriate determination, PHMSA may make this request within 30 days of its receipt of an application for a special permit, modification of a special permit, or party to a special permit, and within 15 days of PHMSA’s receipt of an application for renewal of a special permit (see § 107.133(a)). The applicant has 30 days from the day it receives this request in writing to provide the information. If the applicant does not respond to a written request for additional information within 30 days of the date the request was received, PHMSA may deem the application incomplete and deny it. However, if the applicant responds in writing within the 30-day period requesting an additional 30 days within which it will gather the requested information, the Associate Administrator may grant the 30-day extension. Over the past year, PHMSA has received fewer complaints from applicants about this phase of the special permit and approval review processes.

C. Fitness

In 1996, PHMSA amended the HMR so that it may [emphasis added] issue a special permit and/or approval upon finding that “the applicant is fit to conduct the activity authorized” by the special permit and/or approval, and the special permit’s or approval’s renewal or modifications. See Docket No. HM-207C, 61 FR 21084. We later revised these provisions on January 5, 2011, in a final rule, entitled “Hazardous Materials Transportation: Revisions of Special Permits Procedures,” issued under Docket HM-233B (76 FR 454). The final rule clarified existing requirements in the special permits application procedures. It also required additional, more detailed information in each application so PHMSA could strengthen its oversight of the special permits program. Specifically, the final rule established regulations that:

- Authorized electronic service for all special permit and approval actions;
- Replaced the obsolete word “exemption” with “special permit” and removed language stating these terms were equivalent;
- Revised the requirements to submit an application for party-to status and to renew, modify, reconsider, and appeal a special permit;
- Revised the requirements to process, evaluate, modify, suspend, or terminate a special permit; and
- Provided applicants with an online application option to promote flexibility and reduce the paperwork burden on applicants.

In addition, § 107.113(f)(5) was revised in the Docket No. HM-233B final rule to state that a fitness “assessment may be based on information in the application, prior compliance history of the applicant, and other information available to the Associate Administrator.” As a

result of these activities, stakeholders expressed concerns regarding the fitness assessment process and requested a rulemaking with a notice and comment period to address how fitness is determined under the HMR.

D. Public Meetings

On February 29, 2012, PHMSA hosted a public meeting at the Department's Washington, DC, headquarters. The goals of the meeting were to ascertain the concerns of special permit and approval stakeholders, examine what conditions may be used to successfully assess an applicant's ability to operate under a special permit or approval, solicit comments on past changes, and hear ideas regarding process improvement. Eighteen stakeholders spoke at the meeting. These stakeholders expressed interest in becoming involved in PHMSA's process to resolve special permit and approval processing concerns, but were especially concerned with the special permit process. Representatives from the following companies provided comments and/or asked questions:

- American Chemistry Council
- American Coatings Association
- Arrowhead Industrial Services
- Association of Hazmat Shippers
- Chlorine Institute
- Citizens for All Transit Chemical Contamination
- Council on Safe Transportation of Hazardous Articles, Inc. (COSTHA)
- Dangerous Goods Advisory Council
- Gases and Welding Distributors Association

- Institute of Makers of Explosives
- Industrial Packaging Alliance of North America
- Labelmaster Services
- National Private Truck Council
- North American Transportation Consultants, Inc.
- Nuclear Information and Resource Service
- Praxair, Inc.
- Teledyne Consulting Group
- United Parcel Service

You may review the meeting's transcript at "<http://regulations.gov>" under Docket No. PHMSA-2012-0260 (HM-233E). Key issues raised during the public meeting are summarized below.

i. PHMSA's Basis for Fitness Review – Under § 107.113(f)(5), the HMR authorize PHMSA to consider evidence of an applicant's fitness, i.e., the applicant's demonstrated and documented knowledge and capability to conduct the activity the special permit would authorize, when deciding whether to issue or deny an application. Most attendees at the meeting were concerned about what types of criteria would be used to determine fitness and if these criteria would fairly assess an applicant's ability to perform the tasks authorized in the special permit. Some attendees requested PHMSA spend less time assessing an applicant's fitness and more time evaluating the application for its safe (technical) merit, the assumption being that using a safe design would inherently be safe because of the user's knowledge of the tasks required in a special permit, regardless of the user's safe performance and/or incident history. PHMSA

disagrees. The establishment of safe practices and procedures is an essential part of each special permit and approval. However, PHMSA and DOT's internal review and on-site inspections of how special permits were applied revealed in many instances that special permits were not being used in ways authorized in the special permit. Further, PHMSA found reliance on the requirements in the special permit alone was inadequate to determine an applicant's ability to carry out these tasks, who was performing the tasks, or where these tasks were being done. In addition, tasks and procedures requested in special permit and approval applications vary and must be considered on a case-by-case basis. As a result, PHMSA needed additional information to determine the applicant's ability to satisfactorily complete required tasks. PHMSA revised its previous system for making these determinations to include a fitness requirement in the HMR in response to the March 4, 1995 Presidential Memorandum entitled "Regulatory Reinvention Initiative," which directed the federal government, in part, to partner with people and other federal agencies "to issue sensible regulations that impose the least burden without sacrificing rational and necessary protections." PHMSA then developed SOPs in guidance documents, as mentioned earlier in this preamble, to further explain how PHMSA managed the fitness review process. In this NPRM, PHMSA proposes to revise its SOPs to clarify what phases in the review process are used based on the type of application submitted.

Several attendees suggested that fitness assessments should be based only on a risk evaluation of number and type of incidents, reports, approvals, independent inspection agencies, and the high degree of risk of the activities requested in each special permit application. Many supported limiting the assessment criteria to those incidents involving death and serious injury, stating that this position is consistent with the original intent of PHMSA's fitness assessment requirements. One attendee suggested different criteria should be established for large and small

operators due to the differences in their exposure to events that can cause an incident, and stated the “one-size fits all” approach PHMSA is proposing is inappropriate and unfair. A few attendees recommended that fitness reviews be based on the ability of the applicant to perform the functions requested in the special permit or approval application. Another attendee recommended an applicant’s fitness be evaluated for new or alternative operations only because the successful performance of these tasks is “heavily dependent” on the applicant’s ability to perform them. Cynthia Hilton, Institute of Makers of Explosives, recommended that PHMSA use the following procedural and fitness criteria to make this assessment: 1) “a standardized look-back period of four years...the typical duration of a special permit, 2) fitness reviews not ... triggered by the filing of an application but periodically performed” and designed to “expire after four years unless revoked or suspended due to subsequent findings of imminent hazard or a pattern of knowing or willful non-compliance,” 3) when processing applications to make determinations of fitness “start with a presumption of applicant fitness rather than ... a position that an applicant must establish fitness,” 4) combine evaluation tasks, 5) undertake “site visits by Field Operations only ... where fitness cannot be demonstrated by some other means,” 6) do not select an applicant “for additional scrutiny solely because they’re moving a Table 1 [§ 172.504(e)] material,” and 7) do not include “errors on shipping papers, minor leaks in packaging, inadequacies in test reports” when determining “a finding of unfitness” but do include “a flagrant pattern of serious violations affecting safety....”

PHMSA agrees with many of the recommendations of these attendees. In this NPRM, PHMSA has revised its SOPs to base its fitness evaluation and safety profile reviews on the ability of each applicant to perform the tasks authorized in a special permit or approval. Further, PHMSA’s approach for detecting applicant incidents and/or violations is designed to detect

flagrant patterns and serious violations in the four years prior to submitting an application. In addition, applicants must have two or more incidents to trigger a review; they are not subject to review just because they are moving a § 172.504(e) Table 1 material. To the extent possible, PHMSA has combined evaluation tasks. For example, the automatic and technical reviews are performed concurrently. However, PHMSA also disagrees with some of the attendees' suggestions. For example, PHMSA disagrees with the attendee's suggestion that an applicant's fitness be evaluated for new or alternative operations only. Historically, PHMSA has found an applicant's pattern of minor violations could reveal larger problems, such as with training. PHMSA initially processes each application automatically by computer. As a result, this process does not presume innocence or guilt and cannot be limited to a six-month time period before another automatic review is done. However, after the automatic review is complete, for new applications PHMSA may consider only fitness data since the last fitness review. For new companies with no performance history, PHMSA will assess their training records. In addition, companies that handle special permit and approval packagings without opening them typically may reshipe these packaging when in conformance with the terms of the special permit or approval. PHMSA requests public comment on how to assess hazmat manufacturers that do not ship.

PHMSA finds the suggestion to ignore minor leaks in packaging may not be inconsequential depending on the risks contained in the material, and, therefore, may not eliminate this as a consideration in a fitness evaluation. Regarding the elimination of on-site visits or performing such visits as a last resort, PHMSA disagrees because an on-site review is part of the process to determine if a fitness determination is accurate. PHMSA has found some information can only be determined by visiting the applicant at its facility because the agency or

appropriate Department official is in the best position to determine what packagings and/or operations requested in the application are safe under the HMR and what appropriate operational controls or limitations may be needed. On-site visits are also used to clear up misunderstandings or inaccuracies. A special permit provides an equivalent level of safety or consistency with the public interest in a manner that will adequately protect against the risks to life and property inherent in transporting hazardous materials. A negative fitness determination may suggest that an applicant has not demonstrated or documented its knowledge and capabilities to assure that it has an appropriate level of safety and performance. Although the automated review PHMSA is proposing does not include variations weighted for company size, based on our history with making fitness determinations, PHMSA believes the SOPs proposed in this NPRM will be effective in determining the safety of the tasks requested in the application and the applicant's ability to perform these tasks safely under the HMR.

One attendee recommended PHMSA perform fitness determinations of each special permit holder every one or two years, or on the basis of another determining factor, so that holders will know when a review is coming and, presumably, can plan for it accordingly. PHMSA disagrees as it conducts reviews for new or renewal applicants at the time of application. Further, PHMSA does not have sufficient resources or funds to perform this task.

One attendee suggested fitness evaluations include determining if employees are hazmat trained in conformance with 49 CFR Part 172, Subpart F, are able to demonstrate that they can follow the requirements authorized under the special permit and HMR, and perform their assigned tasks. This attendee also recommended the fitness evaluation include determining if the applicant has a quality assurance program. Another attendee suggested PHMSA use the fitness review process to ensure the applicant is properly registered under PHMSA's Hazardous

Materials Registration program prescribed in 49 CFR Part 107, Subpart G. PHMSA agrees.

Each applicant's registration, if required, will be assessed during the safety profile review, and hazmat training will be assessed during the on-site inspection, if one is conducted.

One attendee suggested applicants requesting party-to status for an existing special permit be excepted from a fitness evaluation because they will be manufacturing the same package that is successfully manufactured by others already party to that special permit. PHMSA disagrees. A fitness review is different from a safety equivalency evaluation. When an applicant applies for party status to an existing special permit, the technical review is not repeated since PHMSA has already determined what provisions in the special permit will provide an adequate level of safety. However, PHMSA has found historically that applicants vary in their ability to perform the tasks required in a special permit and must be individually assessed to ensure the safe execution of the special permit.

One attendee asked if an applicant has more than one location, will PHMSA perform a fitness assessment on each individual location or will a single location be used to determine the assessment for the entire company. PHMSA will review companies with multiple locations as one organization, placing an emphasis on its examination of the company's locations where the requested actions and/or processes are being performed. If deficiencies are noted, it is the company's responsibility to correct these deficiencies throughout its organization.

ii. Data Accuracy – PHMSA uses its own incident history and compliance information as well as that from other sources, e.g., federal and state agencies, to assist in determining which applicant is subject to a fitness assessment. Some attendees stated that this information is either inaccurate or reflects incidents that do not correspond with special permit performance, such as technical errors on shipping papers, minor leaks, or inadequacies in test reports. Some attendees

questioned the accuracy of information in other agencies' databases, and how these inaccuracies may affect PHMSA's use of this information when determining if an applicant will be subject to a fitness assessment. Stakeholders also questioned if using data not intended for PHMSA's purposes could lead to inaccurate determinations. Other attendees were concerned about the age of the incidents in the database and whether companies with recorded incidents had corrected problems. One attendee suggested PHMSA use the Federal Motor Carrier Safety Administration's (FMCSA) Compliance, Safety, and Accountability (CSA) program data as a more accurate example of information that represents a 6-month time frame. If PHMSA did use older information, one attendee suggested it use a fixed time period. Robyn Heald, Chlorine Institute, stated "an applicant's capability can best be judged by its past and current performance and compliance with the current regulations. PHMSA should continue to review an applicant's level of fitness in cases of new or alternative operations prior to considering approval. Based on the background PHMSA provided,... it appears that when all is said and done the majority of applicants are determined to be fit."

PHMSA enters the applicant's information into the Hazmat Intelligence Portal (HIP), a web-based application that provides an integrated information source to identify hazardous materials safety trends through the analysis of incident and accident information. HIP incorporates data from the Hazardous Materials Information System (HMIS), which maintains and provides access to comprehensive information on hazardous materials incidents, special permits and approvals, enforcement actions, and other elements that support PHMSA's regulatory program. HIP also incorporates data from FMCSA's Safety Fitness Electronic Records (SAFER) System to evaluate an applicant's fitness, which provides company safety data and related services to the industry and public. This information is readily available through

PHMSA's database search and FMCSA's portal system and SAFER. These databases only provide triggers for a safety review. Determinations are made only after a safety profile review or on-site inspection is complete. At this time, PHMSA has determined that less than one percent of special permit applications are found unfit.

Many sources for this information are self-reporting and vary on the type and quantity of information collected. As a result, the data collected may contain errors or inconsistencies, such as reporting multiple spills from one packaging in one incident as separate incidents, reporting the same type of event differently, or providing gathered data that may be too dissimilar to provide an adequate comparison. We know some information from other databases used in HIP does not meet all the conditions in PHMSA's special permit and approval programs but has merit as a tool to show areas where potential problems may exist. PHMSA normalizes this data during the safety profile review by contacting the applicant to obtain the number of hazardous materials shipments and the applicant's hazardous materials incident ratio. PHMSA or the Operating Administration (OA) also evaluate incident reports during the safety profile review to determine if any incidents are attributable to the applicant or a package, or if the incident reports contain errors. In this NPRM, PHMSA is reducing the number of incident categories that trigger a review from five to three, focusing on death and injury and high-consequence incidents only. PHMSA is removing low-level incident data from its fitness determination process. In addition, triggers have been raised by 50 percent in two of the categories. PHMSA notes that errors in other agency databases must be corrected by contacting the agency or authority in charge of that database directly. PHMSA has no authority to change their information. However, we are always trying to improve the quality of our data and invite public comment on how to improve

this information. Specifically, PHMSA requests public information on how long it takes applicants to get incorrect incident information recorded in databases corrected.

iii. Streamline the Special Permit Review Process – As a part of the HMTSIA directive to issue SOPs that support how the special permit and approval programs are administered, PHMSA is looking at ways to improve how applicants' submissions are processed. The majority of attendees supported PHMSA's efforts to streamline its fitness assessment procedures, but differed in how they believed results should be achieved. One attendee indicated that the length of time PHMSA takes to process and issue a special permit or approval adversely impacts the competition of U.S. industry, and recommended that all evaluation criteria be risk-based. Another attendee suggested PHMSA would make the special permit and approval application process more effective and efficient if it differentiated between how it processes applications concerning packaging design and those concerning operations. This attendee recommended applications concerning packaging design should concern only the merits of the design itself, because a safer, better performing design stands on its own merit and should not be affected by an applicant's performance history. One attendee suggested the review process would be more efficient if PHMSA checked to determine if an applicant is hazmat registered, if applicable, under PHMSA's program specified in Subpart G of 49 CFR Part 107 (Registration of Persons Who Offer or Transport Hazardous Materials).

PHMSA is continually improving its database capabilities, and in this NPRM is restructuring its fitness program to increase efficiency. To capture faulty behaviors that may prevent the safe transportation of hazardous materials in commerce, PHMSA applies the same fitness criteria to hazmat packaging designs and operations. However, this process cannot consider all impacts. PHMSA relies on the expertise of the modal agencies to clarify the risks

associated with each material and procedure the applicant requests for use in a specific transportation mode. PHMSA also shares its databases with the modal and other hazmat-related agencies to run in their own programs for their use to alert them to potential problem areas. PHMSA proposes in this NPRM to use information generated four years prior to submission of the application and to limit its information to exclude lessor incidents. PHMSA believes limiting the fitness review to a fixed time period and excluding lessor incidents will improve the timeliness of its review process. FMCSA uses information generated in the last 24 months of motor carrier data. PHMSA also seeks public comment for ways to improve the processing of its special permit and approval application processes, and to improve the clarity of its communications with the applicants to ensure they know how, where, and what type of information to submit to improve PHMSA or the OA's processing of their applications.

iv. Adjudication, Resolutions, and Denials – PHMSA is proposing in this NPRM to clarify its process for issuing adjudications, resolutions, and denials to include determinations of an applicant's fitness. Several attendees were concerned with how PHMSA will adjudicate, resolve, or deny its determinations of special permit applicants as unfit. One attendee suggested that PHMSA not deny an application for a single criterion unless there is an imminent hazard. This same attendee also requested that PHMSA create a process where an applicant can show cause why the agency should not revoke, suspend, or deny the application. Another suggestion was for PHMSA to give applicants a corrective action plan and an opportunity to perform in compliance with the HMR for six months, similar to a type of probation.

By proposing to limit its special permit and approval review processes to eliminate lower level risks, all applicants are presumed fit unless a minimum level of fitness criteria indicates the application has triggered additional review. Further, all denials are based on on-site inspections

or modal criteria. PHMSA's reconsideration process allows applicants to provide corrective actions to document compliance following a denial. Problems with recordkeeping to keep applications accurate and intact require that PHMSA requests each applicant to submit the entire application again, including any missing or requested information, for a denied or rejected application to be reconsidered. PHMSA requests public comment on how this process may be improved, and if letters requesting additional information clearly describe what information is needed to make the application complete and the process for resubmission.

v. Develop the Fitness Program Through the Rulemaking Process – As mentioned earlier in this preamble, the HMR have required PHMSA to review an applicant's fitness to perform the tasks requested in a special permit or approval application since 1996. In this NPRM, PHMSA proposes to promote clarity by explaining in the SOPs the factors the agency uses to conduct a fitness review.

Most attendees requested that PHMSA issue a notice and comment rulemaking on its proposal to incorporate SOPs and fitness criteria into the HMR for processing special permits. This rulemaking satisfies that request. Another attendee expressed the belief that incorporating the SOPs and fitness criteria through a rulemaking would promote greater accountability and transparency, as well as encourage HMR compliance. PHMSA agrees, and for several years has undertaken many rulemaking projects to incorporate special permits and approvals with a safe performance history and tasks with general applicability into the HMR. Once special permits and approvals are incorporated into the HMR, their fitness will be evaluated with all other HMR regulations based on the percentage of incidents. In addition, PHMSA believes that by clarifying how it proposes to process these applications through this NPRM, applicants will be able to substantially reduce the processing times for their applications.

Additional attendees indicated that incorporating an elaborate review system into the HMR for assessing special permit applications would be extremely difficult to apply to the wide range of applicants. PHMSA agrees that a cumbersome review system is not beneficial, and therefore is proposing to incorporate a more straightforward, user-friendly review system in this NPRM. Attendees also requested that PHMSA limit withholding special permits except in those cases involving egregious violations or willful negligence. PHMSA disagrees. As stated earlier in this preamble, historically PHMSA has found an applicant's pattern of minor violations may reveal larger problems that could adversely affect transportation safety.

vi. Modal or Hazardous Material Regulatory Agencies and Other Country Competent Authorities – When appropriate and based on current agreements between the OAs, PHMSA coordinates the special permit and approval applications it receives with the applicable modal (e.g., Federal Aviation Administration (FAA), Federal Motor Carrier Safety Administration (FMCSA), Federal Railroad Administration (FRA), or U.S. Coast Guard (USCG)) or hazardous material regulatory agencies (e.g., International Atomic Energy Agency (IAEA), Nuclear Regulatory Commission (NRC), Department of Health and Human Services Centers for Disease Control and Prevention (CDC), etc.). By coordinating review of special permit and approval applications with the appropriate subject-matter expert or experts, PHMSA better ensures safe performance of the tasks requested in the application and improves efficiency through the sharing of information. Further, the HMR permit, in various sections, some federal agencies limited authority to directly issue certain types of approvals because of the proven safety of the type of action and/or process requested in the approval, and the subject matter expertise each agency can provide regarding hazardous materials transportation. This is discussed in greater detail later in this preamble. Approvals issued by authorized federal agencies under the HMR

are independent actions by these agencies; however, PHMSA may be asked to review such approvals. It should be noted that these agencies are not subject to the actions PHMSA is required to perform under this proposed rulemaking, but may choose to do so. In addition, PHMSA typically acknowledges hazardous materials approvals issued by competent authorities of other countries.

Attendees offered varied positions on how PHMSA should coordinate with other modal and international agencies. One attendee indicated that coordination with other modal agencies would streamline the fitness assessment process. Another attendee questioned the necessity and costs incurred by other modal agencies to provide PHMSA with their incident information. Two attendees requested that PHMSA accept and recognize similar hazardous materials transportation relief granted by other competent authorities, but did not suggest how PHMSA would make this determination. One attendee requested that PHMSA not allow Department modal agencies to use PHMSA's fitness procedures to impose more stringent fitness requirements than already exist in their modal regulations, and that PHMSA should not use the fitness assessment process to impose its regulations on the modal agencies as to whom is a fit carrier.

E. Notice No. 12-5

On July 5, 2012, PHMSA issued a notice to clarify and provide further guidance on its policy of conducting initial fitness reviews of applicants for classification approvals under Docket No. PHMSA–2012–0059; Notice No. 12–5 (77 FR 39798). In the notice, PHMSA established that it will no longer carry out Initial Fitness Reviews (IFR) as part of the process for classification approvals, including those for fireworks, explosives, organic peroxides, and self-reactive materials. PHMSA has found that the use of available agency information in the HIP and FMCSA SAFER databases is focused on transportation and does not adequately indicate a

company's capability to manufacture the approved product in conformance with the application submitted to PHMSA. Therefore, PHMSA will continue to review the fitness of applicants for classification approvals through application evaluation, inspection, oversight, and intelligence received from PHMSA and/or another OA (e.g., FRA, FAA, FMCSA, and USCG).

III. Special Permit and Approval Standard Operating Procedures

The hazardous materials community is a leader in developing new materials, technologies, and innovative ways of moving materials. Because not every transportation situation can be anticipated and built into the regulations, special permits and approvals enable the hazardous materials industry to quickly, effectively, and safely integrate new products, technologies, and procedures into production and transportation. Before they are authorized by this agency, the applicant must prove that the relief requested is of a safety level that is at least equivalent to that provided in the HMR, or demonstrates an alternative consistent with the public interest that will adequately protect against the risks to life and property inherent in the transportation of hazardous materials. Further, unlike approvals, special permits can occasionally have hundreds of party status holders. As mentioned earlier in this preamble, party status is granted to a person who intends to offer for transportation or transport a hazardous material, or perform an activity subject to the HMR, in the same manner as the original applicant. Historically, PHMSA has found that the new methods introduced in special permits and approvals promote increased transportation efficiency and productivity, and help to ensure our nation's global competitiveness.

Special permits and approvals also reduce the volume and complexity of the HMR by addressing unique or infrequent transportation situations that would be difficult to accommodate

in regulations intended for use by a wide range of shippers and carriers. The discussion below provides an overview of the existing procedures involved in the processing of special permit and approval applications, as well as their implementation.

PHMSA's Approvals and Permits Division manages special permit and approval application processing, application completeness, and coordination of their technical and modal agency reviews. This Division also processes modifications to, suspensions of, and terminations of special permits and approvals. By proposing to include its SOPs into the HMR, it is the goal of the Approvals and Permits Division to fulfill the requirements of MAP-21 and improve each applicant's understanding of the special permits and approvals application process.

The SOPs for the administration of the Approvals and Permits Program are summarized below. These procedures support the timely and accurate processing of approvals and special permits, including New and Modification special permit applications (§ 107.105), Renewals (§ 107.109), Party Status (§ 107.107), as well as New, Renewal, or Modification approval applications (§§ 107.705 and 107.709).

PHMSA assesses all special permit and approval applications in four phases, which it calls the "Application Review Process." We describe these phases--Completeness, Federal Register Publication, Evaluation, and Disposition--in greater detail in sections A through D that follow. PHMSA may reject an application if it is incomplete or insufficient (i.e., it does not conform to the requirements of the applicable subpart). Further, PHMSA will process reconsiderations and appeals in the same manner that the HMR require for new applications. Specific practices for each may be found in the Approvals and Permits guides posted on the PHMSA web page at "<http://www.phmsa.dot.gov/hazmat/regs/sp-a>".

A. Completeness Phase. During the completeness review, PHMSA determines if the application contains all of the information required in 49 CFR Part 107, and if this information is sufficient to determine the safety level of the relief the applicant is requesting. For a special permit, the purpose of the completeness phase is to determine if the applicant submitted the information required by §§ 107.105, 107.107, or 107.109, and as provided in § 107.113(f). PHMSA then must analyze this information to assess whether the action and/or process the applicant requests is sufficient to provide a level of safety equal to that of the HMR, or demonstrates an alternative consistent with the public interest that will adequately protect against the risks to life and property inherent in the transportation of hazardous materials, in conformance with § 107.105(d)(3). For an emergency special permit, the purpose of the completeness phase is to determine if the applicant submitted the information required by § 107.117 to justify emergency status, as well as the full application required by § 107.105, as provided in § 107.117(d). The purpose of an approval's completeness phase is to determine if the applicant submitted the information required by §§ 107.402 or 107.705 and as provided in §§ 107.709.

B. Federal Register Publication.

- i. Special Permit – When a special permit application is sufficient and complete, a summary of the application will be published in the Federal Register, as required by § 107.113(j), for 30 days to allow for public comment.
- ii. Emergency Special Permit – Within 90 days of an emergency special permit being issued, the application will be published in the Federal Register, as required by § 107.117(g), for 30 days to allow for public comment.

iii. Approval – New approvals that are issued are not required to be published in the Federal Register; however, PHMSA will publish them on the PHMSA website.

C. Evaluation Phase. During the evaluation phase, if the tasks or procedures requested in each special permit or approval application are determined to provide an equivalent level of safety to that required in the HMR or, if a required safety level does not exist, that they provide a level of safety that demonstrates an alternative consistent with the public interest that will adequately protect against the risks to life and property inherent in the transportation of hazardous materials. PHMSA also evaluates the applicant to determine its fitness to operate under a special permit or approval.

If PHMSA completes its initial evaluation and determines that the tasks or procedures the applicant requests are mode specific, precedent setting, or meet federal criteria for a “significant economic impact,” PHMSA coordinates the application’s evaluation with the appropriate OA. PHMSA will also coordinate an application evaluation with an OA if the OA specifically requests participation. All other applications not meeting these criteria are evaluated within PHMSA. Whenever possible, coordination of an application occurs within an electronic system to maintain awareness of the document’s location as well as version control.

As part of the evaluation phase, PHMSA and/or the OA conducts technical analyses of the risks that may be associated with transporting a hazardous material using the proposed packaging or operation in the specific mode or modes of transportation the applicant is requesting. Some of the research areas considered include package integrity; risk assessment, management and mitigation; emerging technologies; and human factors that may affect safety. In addition, an OA evaluation provides mode-specific feedback, particularly regarding operational controls, and provides mode-specific information and recommendations concerning

task and/or procedure equivalency with the HMR and the applicant's fitness. PHMSA also coordinates discussions with an OA to resolve any differences concerning these assessments. Based on these analyses, the OHMS Associate Administrator (AA), or the approving official to which the AA has delegated this responsibility, such as an authorized OA official, determines whether the requested proposal meets the required criteria. If the application meets the criteria, the Approvals and Permits Division staff or delegated approving official issues the special permit or approval, along with the agency-specified modifications, if applicable, and documents the results of the evaluation and cause for approval. If the AA or delegated approving official determines that the application does not meet the required criteria, the Approvals and Permits Division staff and, if the application was coordinated, the OA, documents the results of the evaluation and the cause for denial.

i. Special Permit – The purpose of the evaluation phase is to: 1) determine if the application is complete and the actions or processes it requests demonstrate a level of safety at least equal to the HMR or that is consistent with the public interest, and 2) assess if an applicant is fit to operate under a special permit, as provided in §§ 107.113(f)(4) and 107.113(f)(5).

Applicants applying for a renewal or party status to an existing authorized special permit are not subject to an evaluation of the tasks requested in the special permit, but are subject to a fitness review to determine the applicant's ability to carry out these tasks.

ii. Emergency Special Permit – The purpose of the evaluation phase is to determine if the application is complete and in conformance with the requirements prescribed in § 107.117, and if an applicant is fit to operate under a special permit, as provided in §§ 107.113(f)(4) and 107.113(f)(5). When PHMSA finds that an emergency basis does exist for the issuance of a special permit, in the same manner as with a non-emergency special permit, PHMSA will

determine a schedule responsive to the timing needs and/or associated risks of the emergency. If PHMSA finds that an emergency does not exist, the application will be processed in the same manner as a non-emergency special permit.

iii. Approval – The purpose of the evaluation phase is to determine if the application is complete and: 1) if an approval is necessary for the type of activity the applicant wants to perform; 2) if the activity requested is safe and complies with the regulations for its specific approvals category; and 3) if the applicant or registered user is qualified to hold and successfully carry out the tasks prescribed in an approval, as provided in §§ 107.402, 107.709(d)(4) or 107.709(d)(5).

D. Disposition Phase. PHMSA issues the following final dispositions to the applicant in writing: 1) “Reject,” if the application is incomplete or insufficient to determine an equal level of safety or demonstrate an alternative consistent with the public interest that will adequately protect against the risks to life and property inherent in the transportation of hazardous materials; 2) “Deny,” if the application does not provide an equal level of safety or the applicant is not fit to operate under a special permit or approval; or 3) “Issue,” if the application is approved and the special permit or approval is issued, with appropriate guidance for its safe operation if applicable.

i. Special Permit – Once a decision has been made to issue or deny a special permit, the applicant will be notified in writing with the Document or Denial Letter, as provided in § 107.113(g). If PHMSA denies an application for a special permit, the applicant may request reconsideration as provided in § 107.123 and, if PHMSA denies the reconsideration, the applicant may appeal, as provided in § 107.125. Reconsiderations and appeals must state, in detail, any errors in the denial, provide additional information that may impact the disposition,

and state the modification of the final decision sought. PHMSA will process special permit reconsiderations and appeals in the same manner that the HMR require for new applications.

ii. Approval – Once a decision has been made to issue or deny an approval, the applicant will be notified in writing with the Approval or Denial Letter as provided in §§ 107.403 and 107.709(f). If PHMSA denies an application for an approval, the applicant may request reconsideration as provided in § 107.715 and, if the reconsideration is denied, may appeal as provided in § 107.717. Reconsiderations and appeals must state, in detail, any errors in the denial, provide additional information that may impact the disposition, and state the modification of the final decision sought. PHMSA will process approval reconsiderations and appeals in the same manner that the HMR require for new applications.

IV. Special Permit and Approval Application Evaluation Criteria

PHMSA currently uses a variety of methods to assess the safety level of each applicant's request and the applicant's fitness. These include a detailed technical review of the information in each application, telephone and/or in-person interviews with the applicants or their representative, and/or inspections. PHMSA also uses incident reports received from industry, safety and performance data from other federal, state, and local agencies, and information from scientific and technical handbooks, journals, and texts.

As mentioned earlier in this preamble, to fulfill this assessment responsibility, PHMSA coordinates the review of special permit and approval applications with the appropriate OA if the tasks requested in the application meet specific criteria, or if the OA specifically requests participation. The OA's review the application materials, conduct a technical evaluation, and provide their comments and recommendations, which may include recommendations for

operational restrictions or limitations for the special permit. If an OA does not concur, the Project Officer works with that OA to resolve any issues. If the agency PHMSA or the HMR designates as responsible for making this determination finds that as a result of these analyses the requested proposal meets the safety conditions prescribed in the HMR, it documents the results of the evaluation and advances the application for further processing; otherwise it documents the results of the evaluation and the cause for denial.

PHMSA's Field Operations Division and/or the appropriate OA are responsible for conducting HMR compliance inspections and investigations. The Field Operations Division is also responsible for conducting safety profile reviews and determining an applicant's fitness following the safety profile review. Similar to the initial review process of a special permit or approval application, PHMSA coordinates special permit and approval safety profile reviews and fitness determinations with the appropriate OA for its subject-matter expertise and to improve process efficacy. The Field Operations Division or OA may recommend audits of the applicant's operations when determining the applicant's fitness. The Field Operations Division is also responsible for taking enforcement actions for violations of the HMR (such as issuing warning letters and tickets, and recommending civil and criminal penalties), and providing training.

Prior to 2010, PHMSA's methods for evaluating special permits and approval applicants did not allow us to easily assess the fitness of all parties authorized to use a special permit, such as parties to special permits issued to large organizations like industry groups and associations for the use of their members, single holders with multiple facility locations, or new or smaller businesses with little or no hazmat incident or field inspection histories. Without this information, PHMSA principally relied on the safe practices inherent in each special permit to maintain the safety of the hazardous materials transported under their authorization. An internal

review found this method to be insufficient to ensure public safety and determine an applicant's fitness. As a result, PHMSA no longer issues special permits to industry associations and limits a special permit's scope to a specific location.

Since 2010, PHMSA has conducted approximately 12,250 special permit fitness evaluations. The following lists the number of applications PHMSA denied over the last four years:

- 2010: 126
- 2011: 429
- 2012: 119
- 2013: 42.

As of June 20, 2013, these include applications PHMSA denied for being technically unjustified and for applicants PHMSA denied for being unfit.

Since 2010, PHMSA has conducted approximately 105,000 approval fitness evaluations, and denied the following approval applications, listed by type and year.

Table 1: Denied Approvals (Date Run: 6/21/2013)		
Effective Calendar Year	Approval Type	# of Approvals
2010	COMPETENT AUTHORITY	56
2010	EXPLOSIVE	453
2010	FIREWORK	6,699
2010	MANUFACTURER SYMBOL	1
2010	REQUALIFIER	9
2011	COMPETENT AUTHORITY	47
2011	EXPLOSIVE	15
2011	FIREWORK	6,227
2011	REQUALIFIER	12
2012	COMPETENT AUTHORITY	37
2012	EXPLOSIVE	70
2012	FIREWORK	4,656
2012	REQUALIFIER	6
2013	COMPETENT AUTHORITY	16
2013	CYLINDER REQUALIFIER (VISUAL)	1
2013	EXPLOSIVE	52
2013	FIREWORK	2,342
2013	REQUALIFIER	3

Based on information gathered while evaluating special permit and approval applications and during field inspections, PHMSA determined there was a gap in our oversight and fitness review process. To address this concern and improve the overall efficiency of the fitness review, PHMSA established a Fitness Restructuring Team and assigned it the following tasks:

- Define what criteria PHMSA should use to trigger fitness reviews;
- Evaluate the adequacy of the current three-tier fitness review system; and
- Recommend processes that will improve efficiency and eliminate or prevent future fitness evaluation backlogs exceeding 60 days.

This team also clarified and revised the fitness evaluation process to include these items:

- All applications receive an automated review;
- The technical review runs concurrently with the automated review;
- Use four years of data for all determinations;
- Conduct a safety profile review based on the triggers in Table 2, entitled “Safety Profile Review and On-Site Inspection Triggers” (which appears later in this preamble);
- Conduct an On-Site Inspection based on the triggers in Table 2; and
- Establish conditions under which an applicant may be capable of complying with the approval or special permit, and what safety deficiencies may cause a determination of “Unfit.”

The team developed a risk model that mandates the automated initial fitness review described in this paragraph. If an applicant does not pass, a safety profile review and/or on-site inspection, as appropriate, will be conducted by PHMSA’s Field Operations Division staff or a modal partner. To ensure the correct company is assessed, each application is assigned a unique identifier (currently the organization’s Data Universal Numbering System (DUNS) number). In this model, PHMSA uses automated processing to compare an applicant’s performance history to our inspection data and make a determination based on the risk model shown in Table 2 below. This automated review flags entities that meet one or more of the triggers identified in Table 2. If any item in the left column of Table 2 is identified during the automated review, a safety profile review is triggered. If any item in the right column of Table 2 is identified during the automated review or safety profile review, an on-site inspection is triggered. If PHMSA previously conducted a safety profile review of a company, the new safety profile review will start from the date after the last safety profile review was completed. After a review or

inspection of an applicant is complete, including modal coordination if appropriate, PHMSA's Field Operations Division staff will submit a fitness memorandum with a recommendation of fit or unfit, with justification, to the Approvals and Permits Division. PHMSA believes, based on the results of this effort, that the revised SOPs it is proposing in this rulemaking will offer a more effective way to determine an applicant's potential fitness to operate under a special permit or approval.

Table 2 – Safety Profile Review and On-Site Inspection Triggers

Trigger for Safety Profile Review	Trigger for On-Site Inspection*
Death or Injury § 172.504(e) Table 1 (Placarding) material AND Two or more Incidents	Any incident attributable to the applicant or package (not driver error)
Bulk AND Three or more Incidents	
Two or More Prior Enforcement Case Referrals	Insufficient Corrective Actions on any enforcement case OR Independent Inspection Agency (IIA) Items (Except when reinspected with no violations noted)
Foreign Cylinder Manufacturer Or Requalifier	Never Inspected under current criteria (2010)

* The Fitness Coordinator assesses and applies these triggers.

V. Miscellaneous Proposals

i. Clarifying the Definitions for Special Permits and Approvals

The current definitions in 49 CFR §§ 105.5, 107.1, and 171.8 for “special permits” and “approvals” state that other designated Department officials may also issue these documents under the HMR on behalf of PHMSA’s Associate Administrator for Hazardous Materials Safety. This is not entirely correct. As stated earlier in this preamble, 49 U.S.C. § 5117(a) of the Federal hazmat law gives the Secretary of Transportation the authority to issue, modify, or terminate a special permit that varies from 49 U.S.C. Chapter 51, entitled “Transportation of Hazardous Materials,” or a regulation prescribed under 49 U.S.C. §§ 5103(b), 5104, 5110, or 5112. These regulations apply to a person who performs a function regulated by the Secretary under § 5103(b)(1) in a way that achieves a safety level at least equal to the safety level required under 49 U.S.C. Chapter 51, or that is consistent with the public interest and chapter 51, if a required safety level does not exist. PHMSA is the administration within DOT that is primarily responsible for implementing the Federal hazmat law and, through the HMR, issuing special permits.

Under the Federal hazmat law, the Secretary has general regulatory authority to issue competent authority approvals or to designate this authority to PHMSA’s Associate Administrator. Since PHMSA’s inception as the Materials Transportation Board, and later as the Research and Special Programs Administration, it has served as the Department’s Competent Authority for the transportation of hazardous materials and, through the HMR, has issued approvals concerning the transportation of hazardous materials. In the HMR, PHMSA also delegates limited authority to other Department modal agencies to issue approvals in specific situations. To reflect this delegation of authority, PHMSA is proposing to revise the definitions in §§ 105.5, 107.1, and 171.8 for “special permits” and “approvals” to clarify that an approval

and special permit may be issued only by the Associate Administrator, the Associate Administrator's designee, or as otherwise prescribed in the HMR. In addition, PHMSA proposes minor editorial revisions to the approval's definition in § 105.5 to make it identical with the definition for an approval in § 171.8.

ii. Clarifying That An Approval Application is Subject to the HMR When Submitted to Other Agencies

Through several sections in the HMR, PHMSA authorizes that certain types of approval requests can be submitted directly to other Department and federal agencies.¹ Some of these agencies have reported the volume of approval applications they receive can be substantial. For example, the FRA reports that it processed approximately 5,500 One-Time Movement approvals in 2013 and expects to process a similar number in 2014. The FRA also issues approvals for hazardous materials in trailer-on-flat-car (TOFC) and container-on-flat-car (COFC) service, alternative inspection procedures, and railcars with gross weight loads up to 286,000 pounds. Also, PHMSA has learned from our modal agency partners that approval applications they receive often are not complete and, therefore, do not comply with the requirements prescribed in § 107.701. These agencies report processing incomplete approval applications is administratively burdensome and delays their issuance. PHMSA emphasizes that § 107.701(b) specifically states the procedures prescribed for approvals under Subpart H of Part 107 "...are in addition to any requirements in subchapter C of this chapter applicable to a specific approval, registration or report." These procedures apply to all approval applications submitted to perform a function that requires prior consent under the HMR, regardless of the authorized agency.

¹ See §§ 173.301, 173.471, 174.50, 174.63, 175.9, 179.13, 180.417, and 180.509.

Section 107.701(b) also states “if compliance with both a specific requirement of subchapter C of this chapter and a procedure of this subpart is not possible, the specific requirement applies.” However, approval registrations issued under 49 CFR Part 107, Subpart F (Registration of Cargo Tank and Cargo Tank Motor Vehicle Manufacturers, Assemblers, Repairers, Inspectors, Testers, and Design Certifying Engineers) and G (Registration of Persons Who Offer or Transport Hazardous Materials) are not subject to these procedures (see § 107.701(c)). PHMSA invites the public to recommend ways to convey this requirement to applicants who apply for approvals through other agencies, as authorized under the HMR.

VI. Summary Review of Proposed Amendments

In this NPRM, PHMSA is proposing to revise §§ 105.5, 107.1, 107.113, 107.117, 107.709; add a new Appendix A to 49 CFR Part 107, entitled “Standard Operating Procedures for Special Permits and Approvals;” and revise § 171.8 to incorporate its existing administrative procedures for processing special permits and approval applications. These proposed actions are summarized below.

§ 105.5

In § 105.5, we propose to revise the definitions for “approval” and “special permit” to clarify that an approval and special permit may be issued by the Associate Administrator, the Associate Administrator’s designee, or as otherwise prescribed in the HMR.

§ 107.1

In § 107.1, we propose to revise the definitions for “approval” and “special permit” to clarify that an approval and special permit may be issued by the Associate Administrator, the Associate Administrator’s designee, or as otherwise prescribed in the HMR. In addition, we propose to add for clarity new definitions for “applicant fitness,” “fit or fitness,” “fitness coordinator,” and “insufficient corrective action.”

§ 107.113

In § 107.113(a), we propose that the Associate Administrator will review all special permit applications in conformance with standard operating procedures proposed in new 49 CFR Part 107, Appendix A.

§ 107.117

In § 107.117(e), we propose that the Associate Administrator will review all emergency special permit applications in conformance with standard operating procedures proposed in new 49 CFR Part 107, Appendix A.

§ 107.709

In § 107.709(b), we propose that the Associate Administrator will review all approval applications in conformance with standard operating procedures proposed in new 49 CFR Part 107, Appendix A.

49 CFR Part 107, Appendix A

In 49 CFR Part 107, we propose to add new Appendix A to incorporate PHMSA's existing Standard Operating Procedures for processing special permits and approval applications.

§ 171.8

In § 171.8, we propose to revise the definitions for “approval” and “special permit” to clarify that an approval and special permit may be issued by the Associate Administrator, the Associate Administrator's designee, or as otherwise prescribed in the HMR.

VII. Regulatory Analyses and Notices

A. Statutory/Legal Authority for This Rulemaking

This NPRM is published under the authority of 49 U.S.C. § 5103(b) which authorizes the Secretary to prescribe regulations for the safe transportation, including security, of hazardous material in intrastate, interstate, and foreign commerce. 49 U.S.C. § 5117(a) authorizes the Secretary of Transportation to issue a special permit from a regulation prescribed in §§ 5103(b), 5104, 5110, or 5112 of the Federal Hazardous Materials Transportation Law to a person transporting, or causing to be transported, hazardous material in a way that achieves a safety level at least equal to the safety level required under the law, or is consistent with the public interest, if a required safety level does not exist. This NPRM is also established under the authority of § 33012(a) of MAP-21 (Public Law 112-141, July 6, 2012). Section 33012(a) requires that no later than July 6, 2014, the Secretary of Transportation issue a rulemaking to provide notice and an opportunity for public comment on proposed regulations that establish standard operating procedures (SOPs) to support administration of the special permit and

approval programs, and objective criteria to support the evaluation of special permit and approval applications. In this NPRM, PHMSA is addressing the provisions in the Act.

B. Executive Order 12866, 13563, and DOT Regulatory Policies and Procedures

This proposed rule is considered a significant regulatory action under § 3(f) of Executive Order 12866 and was reviewed by the Office of Management and Budget (OMB). The proposed rule is considered a significant rule under the Regulatory Policies and Procedures order issued by the Department of Transportation [44 FR 11034]. Executive Order 13563 supplements and reaffirms the principles governing regulatory review that were established in Executive Order 12866, Regulatory Planning and Review of September 30, 1993. These two Executive Orders require agencies to regulate in the “most cost-effective manner,” to make a “reasoned determination that the benefits of the intended regulation justify its costs,” and to develop regulations that “impose the least burden on society.”

In this notice, PHMSA proposes to amend the HMR to incorporate SOPs for processing and issuing special permit and approval applications. Incorporating these provisions into regulations of general applicability will provide shippers and carriers with clarity and flexibility to comply with PHMSA’s initial review and, as needed, subsequent renewal or modification process. In addition, the proposed rule would reduce the paperwork burden on industry and this agency resulting from delays when processing incomplete applications. Taken together, the provisions of this proposed rule would improve the efficacy of the special permit and approval application and issuance process, which will promote the continued safe transportation of hazardous materials, while reducing transportation costs for the industry and administrative costs for the agency.

The impact of this proposed rule is presumed to be minor. It intends to provide clarity by reducing applicant confusion regarding the special permit and approval application and renewal process, and improve the quality of information and completeness of the application submitted. This will ease the administrative costs of submitting a special permit and approval application and improve processing times. Although it is difficult to quantify the savings, many special permits and approvals have economically impacted companies by improving the efficacy and safety of their operations in a manner that meets or exceeds the requirements prescribed in the HMR. Some examples of positive economic impacts include allowing the use of less expensive non-specification packages, reducing the number of tasks, or other methods that reduce costs incurred before the approval or special permit is issued. As a result, PHMSA calculates that this NPRM does not impose any costs on industry. Although a slight reduction in the costs associated with processing delays may provide nominal benefits, generally, this proposed rule affects only agency procedures; therefore, we assume no change in current industry costs or benefits.

C. Executive Order 13132

This proposed rule was analyzed in accordance with the principles and criteria contained in Executive Order 13132 (“Federalism”). This proposed rule would preempt state, local and Indian tribe requirements but does not propose any regulation that has substantial direct effects on the states, the relationship between the national government and the states, or the distribution of power and responsibilities among the various levels of governments. Therefore, the consultation and funding requirements of Executive Order 13132 do not apply. Federal hazardous material transportation law, 49 U.S.C. §§ 5101-5128, contains an express preemption

provision (49 U.S.C. § 5125(b)) preempting state, local and Indian tribe requirements on certain covered subjects. The covered subjects are:

- (1) The designation, description, and classification of hazardous materials;
- (2) The packing, repacking, handling, labeling, marking, and placarding of hazardous materials;
- (3) The preparation, execution, and use of shipping documents related to hazardous materials and requirements related to the number, contents, and placement of those documents;
- (4) The written notification, recording, and reporting of the unintentional release in transportation of hazardous materials; and
- (5) The designing, manufacturing, fabricating, inspecting, marking, maintaining, reconditioning, repairing, or testing a package, container or packaging component that is represented, marked, certified, or sold as qualified for use in transporting hazardous material in commerce.

This proposed rule addresses covered subject items (1), (2), (3), and (5) and would preempt any State, local, or Indian tribe requirements not meeting the “substantively the same” standard. 49 U.S.C. § 5125(b)(2) states that if PHMSA issues a regulation concerning any of the covered subjects, it must determine and publish, in the Federal Register, the effective date of Federal preemption. The effective date may not be earlier than the 90th day following the date of issuance of the final rule, and not later than two years after the date of issuance. PHMSA proposes the effective date of federal preemption will be 90 days from publication of the final rule in this matter in the Federal Register.

D. Executive Order 13175

This proposed rule was analyzed in accordance with the principles and criteria contained in Executive Order 13175 (“Consultation and Coordination with Indian Tribal Governments”). Because this proposed rule does not have tribal implications and does not impose substantial direct compliance costs on Indian tribal governments, the funding and consultation requirements of Executive Order 13175 do not apply.

E. Regulatory Flexibility Act, Executive Order 13272, and DOT Procedures and Policies

The Regulatory Flexibility Act (5 U.S.C. § 601 et seq.) requires an agency to review regulations to assess their impact on small entities. An agency must conduct a regulatory flexibility analysis unless it determines and certifies that a rule is not expected to have a significant impact on a substantial number of small entities. Incorporation of these SOPs into regulations of general applicability will provide shippers and carriers with additional flexibility to comply with established safety requirements, thereby reducing transportation costs and increasing productivity. Entities affected by the proposed rule conceivably include all persons--shippers, carriers, and others--who offer and/or transport in commerce hazardous materials. The specific focus of the proposed rule is to incorporate standard procedures to assess an applicant’s fitness to perform the required tasks to receive the relief from the HMR that each applicant is requesting. Overall, this proposed rule will reduce the compliance burden on the regulated industries by clarifying PHMSA’s informational requirements for a special permit and approval application. We expect that the applicant will be better able to provide this information and, as a result, PHMSA can improve application processing and issuance times. Therefore, we certify that this NPRM will not have a significant economic impact on a substantial number of small entities.

This proposed rule has been developed in accordance with Executive Order 13272 (“Proper Consideration of Small Entities in Agency Rulemaking”) and DOT's procedures and policies to promote compliance with the Regulatory Flexibility Act to ensure that potential impacts of draft rules on small entities are properly considered.

F. Paperwork Reduction Act

PHMSA has analyzed this proposed rule in accordance with the Paperwork Reduction Act of 1995 (PRA). The PRA requires federal agencies to minimize the paperwork burden imposed on the American public by ensuring maximum utility and quality of federal information, ensuring the use of information technology to improve government performance, and improving the federal government's accountability for managing information collection activities. This NPRM's benefits include reducing applicant confusion about the special permit and approval application and renewal processes; improving the quality of information and completeness of applications submitted; and improving applicant processing times. This NPRM does not impose any additional costs on industry. Although a slight reduction in the costs associated with processing delays may provide nominal benefits, generally, this proposed rule affects only agency procedures; therefore, this proposed rule contains no new information collection requirements subject to the PRA. Further, this NPRM does not include new reporting or recordkeeping requirements.

As stated earlier in this preamble, PHMSA is not aware of any information collection and recordkeeping burdens for the hazardous materials industry associated with the requirements proposed in this rulemaking. Thus, PHMSA has not prepared an information collection document for this rulemaking. However, if any regulated entities determine they will incur information and recordkeeping costs as a result of this NPRM, PHMSA requests that they

provide comments on the possible burden developing, implementing, and maintaining records and information these proposed requirements may impose on businesses applying for a special permit or approval.

Because PHMSA determined this proposed rule does not result in information collection and recordkeeping burdens, PHMSA did not assess its potential information collection costs. However, if information on this matter should become available or if commenters have questions concerning information collection on this NPRM, please direct your comments or questions to Steven Andrews, Deborah Boothe, or T. Glenn Foster, Standards and Rulemaking Division, Pipeline and Hazardous Materials Safety Administration, 1200 New Jersey Avenue SE, Washington, DC 20590-0001, Telephone (202) 366-8553.

Address written comments to the Dockets Unit as identified in the ADDRESSES section of this rulemaking. We must receive comments regarding information collection burdens prior to the close of the comment period identified in the DATES section of this rulemaking. In addition, you may submit comments specifically related to the information collection burden to the PHMSA Desk Officer, Office of Management and Budget, at fax number (202) 395-6974.

G. Regulation Identifier Number (RIN)

A regulation identifier number (RIN) is assigned to each regulatory action listed in the Unified Agenda of Federal Regulations. The Regulatory Information Service Center publishes the Unified Agenda in April and October of each year. The RIN contained in the heading of this document may be used to cross-reference this action with the Unified Agenda.

H. Unfunded Mandates Reform Act of 1995

This proposed rule does not impose unfunded mandates under the Unfunded Mandates Reform Act of 1995. It does not result in costs of \$141.3 million or more to either state, local or

tribal governments, in the aggregate, or to the private sector, and is the least burdensome alternative that achieves the objective of the proposed rule.

I. Environmental Assessment

The National Environmental Policy Act, 42 U.S.C. §§ 4321-4375, requires that federal agencies analyze proposed actions to determine whether the action will have a significant impact on the human environment. The Council on Environmental Quality (CEQ) regulations require federal agencies to conduct an environmental review considering the need for the proposed action, alternatives to the proposed action, probable environmental impacts of the proposed action and alternatives, and the agencies and persons consulted during the consideration process. 40 CFR § 1508.9(b).

The Need for the Proposed Action

This Notice proposes to revise the HMR to include the standard operating procedures and criteria used to evaluate applications for special permits and approvals. This rulemaking also proposes to provide clarity for the applicant as to what conditions need to be satisfied to promote completeness of the applications submitted.

Hazardous materials are capable of affecting human health and the environment if a release were to occur. The need for hazardous materials to support essential services means transportation of highly hazardous materials is unavoidable. These shipments frequently move through densely populated or environmentally sensitive areas where the consequences of an incident could entail loss of life, serious injury, or significant environmental damage. Atmospheric, aquatic, terrestrial, and vegetal resources (for example, wildlife habitats) could also be affected by a hazardous materials release. The adverse environmental impacts associated with releases of most hazardous materials are short-term impacts that can be greatly reduced or

eliminated through prompt clean-up of the incident scene. Improving the process by which the agency assesses the ability of each applicant to perform the tasks issued in a special permit improves the chance that each special permit issued will be performed safely. Therefore, we do not anticipate any significant positive or negative impacts on the environment by incorporating these SOPs into the HMR.

Alternatives to the Proposed Action

The purpose and need of this NPRM is to establish criteria for evaluating applications for approvals and special permits based on the HMR, including assessing an applicant's ability to operate under the approval or special permit. More information about benefits of this NPRM action can be found in the preamble to this NPRM. The alternatives considered in the analysis include: (1) the proposed action, that is, incorporation of SOPs to evaluate applications for approvals and special permits based on the HMR, including assessing an applicant's ability to operate under the approval or special permit into the HMR; and (2) incorporation of some subset of these proposed requirements (i.e., only some of the proposed requirements or modifications to these requirements in response to comments received to this NPRM) as amendments to the HMR; and (3) the "no action" alternative, meaning that none of the NPRM actions would be incorporated into the HMR.

Analysis of the Alternatives

(1) Incorporate Special Permit and Approval Processing Standard Operating Procedures

We are proposing clarifications to certain HMR requirements to include those methods for assessing the ability of new special permit and approval applicants, and those applying for renewals of special permits and approvals, to perform the tasks they have requested for transporting hazardous materials. The process through which special permits and approvals are

evaluated requires the applicant to demonstrate that the requested approval, the alternative transportation method, or proposed packaging provides an equivalent level of safety as that provided in the HMR. Implicit in this process is that the special permit or approval must provide an equivalent level of environmental protection as that provided in the HMR or demonstrate an alternative consistent with the public interest that will adequately protect against the risks to life and property inherent in the transportation of hazardous materials. Thus, incorporating SOPs to assess the performance capability of special permit and approval applicants should maintain or exceed the existing environmental protections built into the HMR.

(2) Incorporation of Some, But Not All, of the Proposed Requirements or Modifications to These Requirements in Response to Comments Received

The changes proposed in this NPRM are designed to promote clarity and ease of the administration of special permits and approvals during the application review process. Since these changes may make it easier for special permit and approval applicants to successfully apply to PHMSA for authorized variances from the HMR, incorporation of the special permit and approval SOPs into the HMR may result in an increased number of applicants transporting hazardous materials under these types of variances. Because PHMSA will have determined the shipping methods authorized under these new variances to be at least equal to the safety level required under the HMR or, if a required safety level does not exist, consistent with the public interest, PHMSA expects that these additional shipments will not result in associated environmental impacts. Incorporating only some of these changes will help to obscure the informational requirements of the special permit and approval application process, confuse the regulated public by providing a partial understanding of the information needed to submit a

complete special permit or approval application, and possibly further delay application review times. PHMSA does not recommend this alternative.

(3) No Action

If no action is taken, then special permit and approval applicants will continue to be assessed in the same manner as they are today. This will result in no change to the current potential effects to the environment, but will also not provide the applicant with information needed to improve its application processing time within PHMSA. Further, it may negatively impact transportation in commerce by not making innovative and safe transportation alternatives more easily available to the hazmat industry. PHMSA does not recommend this alternative.

Comments From Agencies and Public

PHMSA solicits comments about potential environmental impacts associated with this NPRM from other agencies, stakeholders, and citizens.

J. Privacy Act

Anyone is able to search the electronic form of all comments received into any of our dockets by the name of the individual submitting the comment (or signing the comment, if submitted on behalf of an association, business, labor union, etc.). You may review DOT's complete Privacy Act Statement in the Federal Register published on April 11, 2000 (Volume 65, Number 70, pages 19477-78), which may be viewed at "<http://www.gpo.gov/fdsys/pkg/FR-2000-04-11/pdf/00-8505.pdf>".

K. Executive Order 13609 and International Trade Analysis

Under Executive Order 13609, agencies must consider whether the impacts associated with significant variations between domestic and international regulatory approaches are unnecessary, or may impair the ability of American business to export and compete

internationally. In meeting shared challenges involving health, safety, labor, security, environmental, and other issues, international regulatory cooperation can identify approaches that are at least as protective as those that are or would be adopted in the absence of such cooperation. International regulatory cooperation can also reduce, eliminate, or prevent unnecessary differences in regulatory requirements.

Similarly, the Trade Agreements Act of 1979 (Pub. L. 96-39), as amended by the Uruguay Round Agreements Act (Pub. L. 103-465), prohibits federal agencies from establishing any standards or engaging in related activities that create unnecessary obstacles to the foreign commerce of the United States. For purposes of these requirements, federal agencies may participate in the establishment of international standards, so long as the standards have a legitimate domestic objective, such as providing for safety, and do not operate to exclude imports that meet this objective. The statute also requires consideration of international standards and, where appropriate, that they be the basis for U.S. standards.

PHMSA participates in the establishment of international standards in order to protect the safety of the American public, and we have assessed the effects of the proposed rule to ensure that it does not cause unnecessary obstacles to foreign trade. Accordingly, this NPRM is consistent with E.O. 13609 and PHMSA's obligations.

VIII. List of Subjects

49 CFR Part 105

Administrative practice and procedure, Hazardous materials transportation, Penalties, Reporting and recordkeeping requirements.

49 CFR Part 107

Administrative practice and procedure, Hazardous materials transportation, Penalties, Reporting and recordkeeping requirements.

49 CFR Part 171

Exports, Hazardous materials transportation, Hazardous waste, Imports, Incorporation by reference, Reporting and recordkeeping requirements.

In consideration of the foregoing, we are proposing to amend 49 CFR chapter I as follows:

PART 105-HAZARDOUS MATERIALS PROGRAM DEFINITIONS AND GENERAL PROCEDURES

1. The authority citation for part 105 **is revised** to read as follows:

Authority: 49 U.S.C. 5101–5128; 49 CFR 1.81 and 1.97.

2. In § 105.5, the definitions for “approval” and “special permit” are revised in alphabetical order to read as follows:

§ 105.5 Definitions.

* * * * *

Approval means a written authorization, including a competent authority approval, issued by the Associate Administrator, the Associate Administrator’s designee, or as otherwise prescribed in the HMR, to perform a function for which prior authorization by the Associate Administrator is required under subchapter C of this chapter (49 CFR parts 171 through 180).

* * * * *

Special permit means a document issued by the Associate Administrator, the Associate Administrator’s designee, or as otherwise prescribed in the HMR, under the authority of 49 U.S.C. 5117 permitting a person to perform a function that is not otherwise permitted under subchapter A or C of this chapter, or other regulations issued under 49 U.S.C. 5101 et seq. (e.g., Federal Motor Carrier Safety routing requirements).

* * * * *

PART 107—HAZARDOUS MATERIALS PROGRAM PROCEDURES

3. The authority citation for part 107 continues to read as follows:

Authority: 49 U.S.C. 5101–5128, 44701; Pub. L. 101–410 section 4 (28 U.S.C. 2461 note); Pub. L. 104–121 sections 212–213; Pub. L. 104–134 section 31001; Pub. L. 112–141 section 33006, 33010; 49 CFR 1.81 and 1.97.

4. In § 107.1, add the definitions for “applicant fitness,” “fit or fitness,” “fitness coordinator,” “insufficient corrective action,” and revise the definitions for “approval,” “special permit” to read as follows:

§ 107.1 Definitions.

* * * * *

Applicant fitness means a determination by PHMSA, the Associate Administrator's designee, or as otherwise prescribed in the HMR, that a special permit or approval applicant is fit to conduct operations requested in the application or an authorized special permit or approval.

* * * * *

Approval means a written authorization, including a competent authority approval, issued by the Associate Administrator, the Associate Administrator's designee, or as otherwise prescribed in the HMR, to perform a function for which prior authorization by the Associate Administrator is required under subchapter C of this chapter (49 CFR parts 171 through 180).

* * * * *

Fit or Fitness means demonstrated and documented knowledge and capabilities resulting in the assurance of a level of safety and performance necessary to ensure compliance with the applicable provisions and requirements of subchapter C of this chapter or a special permit or approval issued under subchapter C of this chapter.

* * * * *

Fitness coordinator means the PHMSA Field Operations officer or authorized Operating Administration (OA) representative that conducts reviews regarding an organization's hazardous materials operations, including such areas as accident history, compliance data, and other safety and transportation records to determine whether a special permit or approval applicant is determined to be fit as prescribed in §§ 107.113(f)(5) and 107.709(d)(5).

* * * * *

Insufficient corrective action means that either a PHMSA Field Operations officer or authorized Operating Administration (OA) representative has determined that evidence of an applicant's corrective action in response to prior to enforcement cases is insufficient and the

basic safety management controls proposed for the type of hazardous material, packaging, procedures, and/or mode of transportation remain inadequate.

* * * * *

Special permit means a document issued by the Associate Administrator, the Associate Administrator's designee, or as otherwise prescribed in the HMR, under the authority of 49 U.S.C. 5117 permitting a person to perform a function that is not otherwise permitted under subchapters A or C of this chapter, or other regulations issued under 49 U.S.C. 5101 et seq. (e.g., Federal Motor Carrier Safety routing requirements).

* * * * *

5. In § 107.113, paragraph (a) is revised to read as follows:

§ 107.113 Application processing and evaluation.

(a) The Associate Administrator reviews an application for a special permit, modification of a special permit, party to a special permit, or renewal of a special permit in conformance with the standard operating procedures specified in appendix A of this part ("Standard Operating Procedures for Special Permits and Approvals") to determine if it is complete and conforms with the requirements of this subpart. This determination will be made within 30 days of receipt of the application for a special permit, modification of a special permit, or party to a special permit, and within 15 days of receipt of an application for renewal of a special permit. If an application is determined to be incomplete, PHMSA may reject the application. PHMSA will inform the applicant of the deficiency in writing.

* * * * *

6. In § 107.117, paragraph (e) is revised to read as follows:

§ 107.117 Emergency processing.

* * * * *

(e) Upon receipt of all information necessary to process the application, the receiving Department official transmits to the Associate Administrator, by the most rapidly available means of communication, an evaluation as to whether an emergency exists under § 107.117(a) and, if appropriate, recommendations as to the conditions to be included in the special permit. The Associate Administrator will review an application for emergency processing of a special permit in conformance with the standard operating procedures specified in appendix A of this part (“Standard Operating Procedures for Special Permits and Approvals”) to determine if it is complete and conforms with the requirements of this subpart. If the Associate Administrator determines that an emergency exists under § 107.117(a) and that, with reference to the criteria of § 107.113(f), granting of the application is in the public interest, the Associate Administrator will issue the application subject to such terms as necessary and immediately notify the applicant. If the Associate Administrator determines that an emergency does not exist or that granting of the application is not in the public interest, the applicant will be notified immediately.

* * * * *

7. In § 107.709, paragraph (b) is revised to read as follows:

§ 107.709 Processing of an application for approval, including an application for renewal or modification.

* * * * *

(b) The Associate Administrator reviews an application for an approval, modification of an approval, or renewal of an approval in conformance with the standard operating procedures specified in appendix A of this part (“Standard Operating Procedures for Special Permits and Approvals”). At any time during the processing of an application, the Associate Administrator may request additional information from the applicant. If the applicant does not respond to a written request for additional information within 30 days of the date the request was received, PHMSA may deem the application incomplete and deny it. The Associate Administrator may grant a 30-day extension if the applicant makes such a request in writing.

* * * * *

8. Add new Appendix A to 49 CFR Part 107 to read as follows:

APPENDIX A TO PART 107 – STANDARD OPERATING PROCEDURES FOR SPECIAL PERMITS AND APPROVALS

This appendix sets forth the standard operating procedures (SOPs) for processing an application for a special permit or an approval in conformance with 49 CFR Parts 107 and 171-180. It is a guidance document to be used by PHMSA for the internal management of its special permit and approval programs.

A special permit is a document issued by the Associate Administrator, the Associate Administrator’s designee, or as otherwise prescribed in the HMR, under the authority of 49 U.S.C. 5117 permitting a person to perform a function that is not otherwise permitted under subchapter A or C of this chapter, or other regulations issued under 49 U.S.C. 5101 et seq. (e.g., Federal Motor Carrier Safety routing requirements). An approval is a written authorization, including a competent authority approval, issued by the Associate Administrator, the Associate

Administrator's designee, or as otherwise prescribed in the HMR, to perform a function for which prior authorization by the Associate Administrator is required under subchapter C of this chapter (49 CFR parts 171 through 180). PHMSA receives applications for: 1) designation as an approval or certification agency, 2) renewal or modification of a special permit or an approval, 3) granting of party status to a special permit, and 4) emergency processing for a special permit. Depending on the type of application, the SOP review process includes several phases, such as Completeness, Publication, Evaluation, and Disposition, and proceed in the following order.

Special Permit and Approval Evaluation Review Process			
Special Permit	Non-Classification Approval	Classification Approval	Registration Approval
1. Completeness	1. Completeness	1. Completeness	1. Completeness
2. Publication	2. Evaluation	2. Evaluation	2. Evaluation
	a. Technical	a. Technical	a. Fitness only
	b. Fitness		
3. Evaluation	3. Disposition	3. Disposition	3. Disposition
a. Technical	a. Approval	a. Approval	a. Approval
b. Fitness	b. Denial	b. Denial	b. Denial
4. Disposition			
a. Approval			
b. Denial			
5. Reconsideration	4. Reconsideration	4. Reconsideration	4. Reconsideration

A non-classification approval certifies that: an approval holder is qualified to requalify, repair, rebuild, and/or manufacture cylinders stipulated in the HMR; an agency is qualified to perform inspections and other functions outlined in an approval and the HMR; an approval holder is providing an equivalent level of safety or safety that is consistent with the public interest in the transportation of hazardous materials outlined in the approval; and a radioactive package design or material classification fully complies with applicable domestic or international

regulations. A classification approval certifies that explosives, fireworks, chemical oxygen generators, self-reactive materials, and organic peroxides have been classed for manufacturing and/or transportation based on requirements stipulated in the HMR. Registration approvals include the issuance of a unique identification number used solely as an identifier or in conjunction with approval holder's name and address, or the issuance of a registration number that is evidence the approval holder is qualified to perform an HMR authorized function, such as visually requalifying cylinders. This appendix does not include registrations issued under 49 CFR Part 107, Subpart G.

1. Completeness. PHMSA reviews all special permit and approval applications to determine if they contain all the information required under § 107.105 (for a special permit), § 107.117 (for emergency processing) or § 107.402 or § 107.705 (for an approval). If PHMSA determines an application is incomplete or insufficient, PHMSA may reject the application. If PHMSA rejects the application, it will notify the applicant of the deficiencies in writing. An applicant may resubmit a rejected application as a new application, provided the newly submitted application contains the information PHMSA needs to make a determination.

Emergency special permit applications must comply with all the requirements prescribed in § 107.105 for a special permit application, and contain sufficient information for PHMSA to determine that the applicant's request for emergency processing is justified under the conditions prescribed in § 107.117.

2. Publication. When PHMSA determines an application for a new special permit or a request to modify an existing special permit is complete and sufficient, PHMSA publishes a summary of the application in the Federal Register in conformance with § 107.113(b). The

public has 30 days to comment on a new special permit and 15 days to comment on a request for modification of an existing special permit.

3. Evaluation. The evaluation phase consists of two assessments: technical evaluation and fitness evaluation. These evaluations may be done concurrently and are described in greater detail below. When applicable, PHMSA consults and coordinates its evaluation of applications with the following Operating Administration (OA) that share enforcement authority under Federal hazardous material transportation law: Federal Aviation Administration, Federal Motor Carrier Safety Administration, Federal Railroad Administration, and United States Coast Guard. PHMSA also consults other agencies with hazardous material subject-matter expertise, such as the Nuclear Regulatory Commission and the Department of Energy.

(a) Technical evaluation. A technical evaluation considers whether the proposed special permit or approval will achieve a level of safety at least equal to that required under the HMR or, if a required safety level does not exist, considers whether the proposed special permit is consistent with the public interest in that will adequately protect against the risks to life and property inherent in the transportation of hazardous material. For a classification approval, the technical evaluation is a determination that the application meets the requirements of the regulations for issuance of the approval. If formal coordination with another OA is included as part of the evaluation phase, that OA is responsible for managing this process within the applicable OA. The OA reviews the application materials and PHMSA's technical evaluation, and may provide their own evaluation, comments and recommendations. The OA may also recommend operational controls or limitations to be incorporated into the special permit or approval to improve its safety. If an OA does not concur with PHMSA's recommendation based on the evaluation, PHMSA works with the OA to resolve their concerns.

(b) Fitness evaluation. Each applicant for a special permit or non-classification approval is subject to a fitness evaluation to assess if the applicant is fit to conduct the activity authorized by the special permit or approval application. PHMSA will coordinate fitness reviews with the appropriate OA if a proposed activity is specific to a particular mode of transportation, if the proposed activity will set new precedent or have a significant economic impact, or if an OA requests participation. PHMSA does not conduct initial fitness reviews as part of processing classification approvals, which include fireworks, explosives, organic peroxides, and self-reactive materials. Additionally, cylinder approvals and certification agency approvals do not follow the same minimum fitness review model.

(i) Automated Review. An applicant for a special permit or approval which requires a fitness evaluation is subject to an automated fitness review. If the applicant passes the initial automated review, the applicant is determined to be fit. To begin this review, PHMSA or the applicant enters the applicant's information into the Hazardous Materials Information System (HMIS) or the Hazmat Intelligence Portal (HIP), web-based applications that provide an integrated information source to identify hazardous material safety trends through the analysis of incident and accident information, and provide access to comprehensive information on hazardous materials incidents, special permits and approvals, enforcement actions, and other elements that support PHMSA's regulatory program. PHMSA then screens the applicant to determine if, within the four years prior to submitting its application, the applicant was involved in any incident attributable to the applicant or package where one of the following occurred:

- (1) A death or injury;
- (2) Two or more incidents involving a § 172.504(e) (placarding) Table 1 hazardous material;

- (3) Three or more incidents involving a bulk packaging;
- (4) The applicant has a prior enforcement case referral where the Deputy Associate Administrator for Field Operations, or the Deputy Associate Administrator's designee determined insufficient corrective action was taken, or there are Independent Inspection Agency (IIA) noted items on a cylinder requalifier inspection report, except for those applicants who were reinspected and found to have no violations;
- (5) The applicant is a foreign cylinder manufacturer or requalifier, or a select holder that PHMSA or a representative of the Department has never inspected; or
- (6) If an applicant is acting as an interstate carrier of hazardous materials under the terms of the special permit, they will be screened in an automated manner based upon criteria established by FMCSA, such as that contained in its Safety and Fitness Electronic Records (SAFER) system, which consists of interstate carrier data, several states' intrastate data, interstate vehicle registration data, and may include operational data such as inspections and crashes.

(ii) Safety profile review. A fitness coordinator, as defined in § 107.1, conducts a safety profile review of all applicants meeting one of the criteria listed earlier in this appendix under “automated review.” In a safety profile review, PHMSA or the OA performs an in-depth evaluation of the applicant based upon items the automated review triggered concerning the applicant's four-year performance and compliance history prior to the submission of the application. Information considered during this review may include the applicant's history of prior violations, insufficient corrective actions, or evidence that the applicant is at risk of being unable to comply with the terms of an application for an existing special permit, approval, or the HMR. PHMSA also performs the review if two or more modes of transportation are requested in

the application. The applicable OA performs the review if one mode of transportation is requested in the application. After conducting a review, if the fitness coordinator determines that the applicant may be unfit to conduct the activities requested in the application, the coordinator will forward the request and supporting documentation to PHMSA's Field Operations Division, or a representative of the Department, to perform an on-site inspection. After the safety profile review is completed, if the applicant is not selected for an on-site inspection, the applicant is determined to be fit.

(iii) On-Site Inspection. (A) PHMSA considers the factors in paragraph 3(b) as evidence that an applicant is at risk of being unable to comply with the terms of an application, including those listed below. PHMSA's Field Operations Division or representative of the Department will conduct an on-site inspection at the recommendation of the fitness coordinator if one of the following criteria applies:

- (1) Any incident listed under automated review in paragraph 3(b)(i) of this appendix is attributable to the applicant or package, other than driver error;
- (2) Insufficient Corrective Actions, as defined in § 107.1, in any enforcement case for a period of four years prior to submitting the application, except when reinspected with no violations noted;
- (3) Items noted by an IIA on a cylinder requalifier inspection report, except when reinspected with no violations noted; or
- (4) The applicant is a foreign cylinder manufacturer or requalifier that has never been inspected under current criteria.

(B) If, during an inspection, the PHMSA investigator or a representative of the Department finds evidence in the four years prior to submitting its application that an applicant

has not implemented sufficient corrective actions for prior violations, or is at risk of being unable to comply with the terms of an application for or an existing special permit, approval, or the HMR, then PHMSA will determine that the applicant is unfit to conduct the activities requested in an application or authorized special permit or approval.

4. Disposition. (a) Special Permit. If an application for a special permit is issued, PHMSA provides the applicant, in writing, with a special permit and an authorization letter if party status is authorized.

(b) Approval. If an application for approval is issued, PHMSA provides the applicant, in writing, with an approval, which may come in various forms, including:

(1) An “EX” approval number for classifying an explosive (including fireworks; see §§ 173.56, 173.124, 173.128, and 173.168(a));

(2) A “RIN” (requalification identification number) to uniquely identify a cylinder requalification, repair, or rebuilding facility (see § 180.203);

(3) A “VIN” (visual identification number) to uniquely identify a facility that performs an internal or external visual inspection, or both, of a cylinder in conformance with 49 CFR part 180, subpart C, or applicable CGA Pamphlet or HMR provision;

(4) An “M” number for identifying packaging manufacturers (see § 178.3); or

(5) A “CA” (competent authority) for general approvals (see §§ 107.705, 173.185, and 173.230).

(c) Denial. An application for a special permit or approval may be denied in whole or in part. For example, if an application contains sufficient information to successfully complete its technical review but PHMSA determines the applicant is unfit, the application will be denied. If an application for a special permit or an approval is denied, PHMSA provides the applicant, in

writing, with a brief statement of the reasons for denial and the opportunity to request reconsideration (see §§ 107.113(g), 107.402, and 107.709(f)).

(d) Reconsideration. (1) Special Permit. If an application for a special permit is denied, the applicant may request reconsideration as provided in § 107.123 and, if the reconsideration is denied, may appeal as provided in § 107.125. Applicants submitting special permit reconsiderations and appeals must do so in the same manner as new applications, provided the new submission is sufficiently complete to make a determination.

(2) Approval. If an application for an approval is denied, the applicant may request reconsideration as provided in § 107.715 and, if the reconsideration is denied, may appeal as provided in § 107.717. Applicants submitting approval reconsiderations and appeals must do so in the same manner as new applications, provided the new submission is sufficiently complete to make a determination.

PART 171—GENERAL INFORMATION, REGULATIONS, AND DEFINITIONS

9. The authority citation for part 171 is revised to read as follows:

Authority: 49 U.S.C. 5101–5128, 44701; Pub. L. 101–410, section 4 (28 U.S.C. 2461 note); Pub. L. 104–121, sections 212–213; Pub. L. 104–134, section 31001; 49 CFR 1.81 and 1.97.

10. In § 171.8, the definitions for “approval,” “special permit” are revised in alphabetical order to read as follows:

§ 171.8 Definitions and abbreviations.

* * * * *

Approval means a written authorization, including a competent authority approval, issued by the Associate Administrator, the Associate Administrator's designee, or as otherwise prescribed in the HMR, to perform a function for which prior authorization by the Associate Administrator is required under subchapter C of this chapter (49 CFR parts 171 through 180).

* * * * *

Special permit means a document issued by the Associate Administrator, the Associate Administrator's designee, or as otherwise prescribed in the HMR, under the authority of 49 U.S.C. 5117 permitting a person to perform a function that is not otherwise permitted under subchapter A or C of this chapter, or other regulations issued under 49 U.S.C. 5101 et seq. (e.g., Federal Motor Carrier Safety routing requirements).

* * * * *

Issued in Washington, DC, under the authority delegated in 49 CFR part 1.97.

Magdy El-Sibaie,
Associate Administrator for Hazardous Materials Safety
Pipeline and Hazardous Materials Safety Administration

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